IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

IN RE INTEL CORPORATION MICROPROCESSOR ANTITRUST LITIGATION)))) MDL No. 05-1717-JJF)
PHIL PAUL, on behalf of himself and all others similarly situated,	
Plaintiffs,) Civil Action No. 05-485-JJF
v.) CONSOLIDATED ACTION
INTEL CORPORATION,	REDACTED
Defendant.	PUBLIC INSPECTION VERSION

REPLY TO INTEL'S OPPOSITION TO CLASS PLAINTIFFS' PRELIMINARY TRIAL PLAN

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Dated: February 1, 2010

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Manual For Complex Litigation (4ht Ed.)	
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STATE ANTITRUST PRACTICE AND STATUTES (THIRD ED. 2004)	

I. INTRODUCTION

Class Plaintiffs' Preliminary Trial Plan, D.I. 1667¹ ("TP"), demonstrates that Class Plaintiffs' liability and consumer harm theories are capable of common proof at trial, and shows that a trial under the Sherman Act and the Antitrust and Consumer Protection Laws of the Included States would be manageable. Intel's Response to Class Plaintiffs' Preliminary Trial Plan, D.I. 1875 ("TP Response"), is flawed, inadequate, and makes no attempt to discuss – much less rebut – the substantial amount of common, class-wide evidence put forward therein.

First, no matter how the class is ultimately defined — whether it is 26 separate statewide classes or a nationwide class under California law — Class Plaintiffs have proposed a single trial in the U.S. District Court for the District of Delaware. Class Plaintiffs have also proposed that the trial be bifurcated into two phases. See TP at 1. In the initial phase ("Phase I"), Class Plaintiffs will try common issues of liability, impact to direct and indirect purchasers, and the measure and determination of the total amount of damages to the jury. Id. Assuming the jury reaches a verdict in favor of Class Plaintiffs on these issues, Class Plaintiffs will then present evidence as to the purchases made by individual class members during a second phase of the trial ("Phase II"). This routine method of trying class action cases overcomes Intel's overstated concerns regarding manageability. See TP at n.3.

Second, Class Plaintiffs' trial evidence will be the same regardless of how the class or classes are ultimately defined, where the class member resides, or which laws are at issue. Intel cannot articulate any reasonable scenario under which the evidence offered to support the claims of one particular member of a potential class would be any different than the evidence offered to support the claims of any other member of a potential class.

References to "D.I. ____" are to docket items in C.A. No. 05-485-JJF.

This bifurcated structure ensures that a trial in this case will be manageable. Any issues regarding the extent of an individual class member's damages, or slight differences in damage calculations necessitated by the various laws of the Included States, can be determined during Phase II. This is routine.

Third, Class Plaintiffs' Trial Plan puts forward common proof capable of demonstrating at trial that Intel is and has been engaged in a widespread, persistent, secretive and global pattern of illegal behavior specifically designed to avoid price competition. Common evidence is capable of showing that, as part of an overall scheme to

2 Ultimately,

Intel's customers

3 In this way, Intel foments fear and dependency in its customer base, thus corrupting what should be a competitive and well-functioning marketplace for microprocessors and PCs.

Common proof will show that through this strategy,

See. e.g. TP at

Herbert Tab 139

Citations to "Herbert Tab ___" are to the Exhibits In Support Of Reply In Further Support Of Class Plaintiffs' Motion For Class Certification, Class Plaintiffs' Preliminary Trial Plan, And Memorandum In Opposition To Defendant Intel Corporation's Motion To Exclude Testimony Of Dr. Keith Leffler, filed July 29, 2009, D.I. 1672-1676.

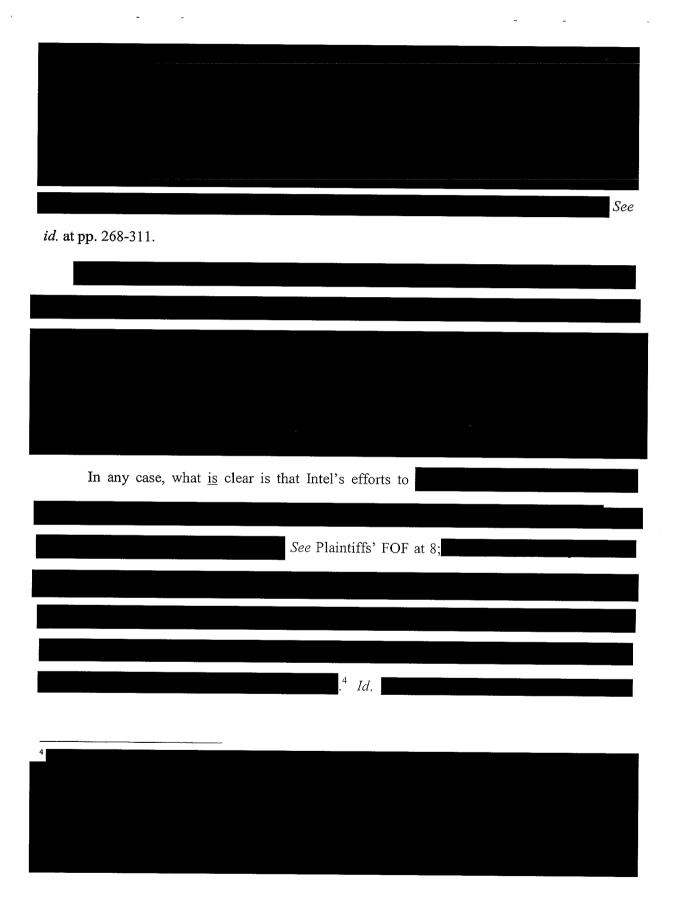
² Notwithstanding the voluminous evidence to the contrary, Intel has stated publicly that "We don't buy exclusivity." Roger Parloff, Intel's Worst Nightmare, Nov. 16, 2006, http://money.cnn.com/magazines/fortune/fortune_archive/2006/08/21/8383598/index.htm (viewed on Jan. 31, 2010).

³ See, e.g., Herbert Tab 169 at

n.17; Class Plaintiffs Proposed Findings of Fact, filed herewith ("Plaintiffs' FOF") ¶¶ 86-87.
Common proof will also show that
See
Plaintiffs' FOF at Section IV.C.; Reply in Further Support of Class Plaintiffs' Motion for Class
Certification, D.I. 1666 ("Class Reply") at 6-15; TP at 13-47, n.21.
See, e.g., TP at 26. This is
precisely the opposite of competition on the merits.
The clear implication of Intel's abusive and exclusionary strategies is that
Rather, as
common evidence will demonstrate,
Declaration of Vovin II Dovernord ("Dovernord" D. 12") T. I.
Declaration of Kevin H. Davenport ("Davenport Decl.") Tab
86
See Plaintiffs' FOF at Section
IV.D.3.b.
Substantial common evidence also demonstrates that
The impact of Intel's conduct on consumers is obvious – higher prices and fewer choices
for personal computers. Intel understood that

See Plaintiffs' FOF at Section
IV.C.2.; TP at 13-21; Class Reply at 2-4 and 8-11.
See Plaintiffs' FOF at
Section IV.C.2.; TP at 13-21; Class Reply at 2-4 and 8-11. Under this regime, Intel's customers
See Plaintiffs'
FOF at Section IV.D.3.a, ; TP at 62-66; Class Reply at 41-49.
See
Leffler's Revised Reply Declaration ("Leffler's Revised Reply"), D.I. 1705 at Exhibit E, Table
16.
Id. at ¶15 (noting

Fourth, Intel fails to address
See Plaintiffs' FOF at Section IV.C.2.; TP at
13-21; Class Reply at 2-4, 7-8. In so doing, Intel blithely ignores huge amounts of common
evidence capable of demonstrating
focuses only on narrow technical issues related to its
Response at n.1.
Intel similarly ignores considerable amounts of common evidence detailed in Class
Plaintiffs' Trial Plan and Reply Brief that can be used at trial to demonstrate:
TP
at 71. See generally TP at 48-76; Class Reply at 41-49; Plaintiffs FOF at Section IV.D.3. The
common evidence supporting these points is capable of establishing at trial that Intel's conduct
By ignoring this common evidence, Intel
effectively concedes the efficacy of a trial on common issues in this case.
Fifth, despite Intel's assertions to the contrary, the positions and evidence advanced in
Class Plaintiffs' Trial Plan are consistent with



In short, Intel's Response to Class Plaintiffs' Trial Plan ignores the	
Intel's objection	
do not cast doubt on the fact that common evidence will, for example, demonstrate at trial tha	t
Intel is an	

II. ARGUMENT

A. The Evidence Presented in Class Plaintiffs' Trial Plan is Common to the Class.

Class Plaintiffs have presented considerable amounts of undisputed common evidence

See TP at 9-76; Class Plaintiffs' Reply Memorandum in Support of Class Certification ("Class Reply Brief") at 6-15, 29-51; Plaintiffs' FOF at Sections IV.C and D. Each piece of evidence presented is common to the Class, or to members of each Statewide Class, irrespective of where any individual class member resides. Intel has failed to explain how the evidence supporting the claims of one individual class member would be any different than the evidence supporting the claims of any other individual class member.

A class action trial under the Sherman Act and the Antitrust and Consumer Protection Laws of the Included States will focus squarely on Intel's conduct and the effect of that conduct on the marketplace.

B. Common Evidence Demonstrates That Intel Has Engaged In Anticompetitive Conduct Since Well Before The Beginning of the Class Period

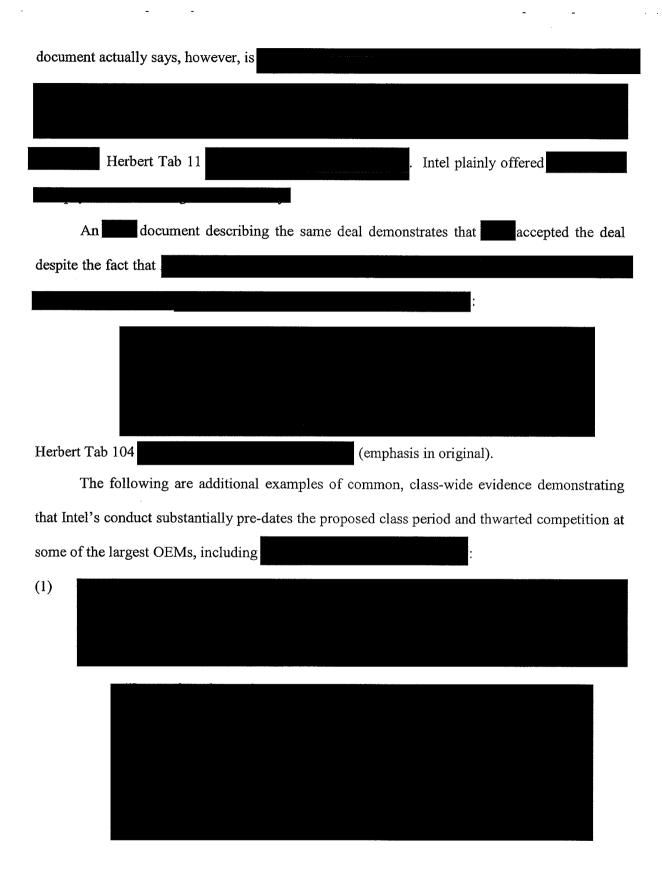
Class Plaintiffs' Trial Plan contains substantial amounts of common evidence capable of proving that Intel

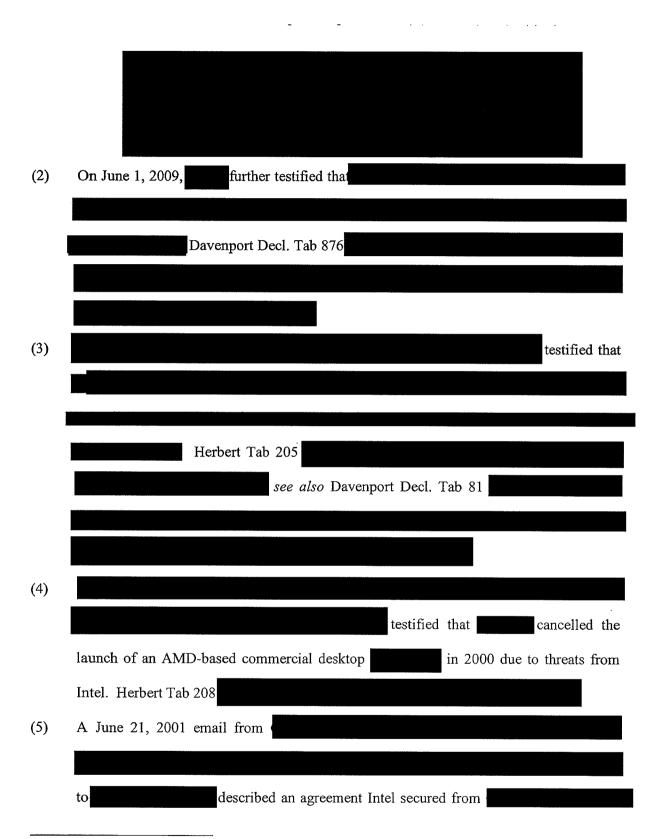
Class Plaintiffs offer additional evidence on this point below. 6

See Davenport Decl. Tab 87

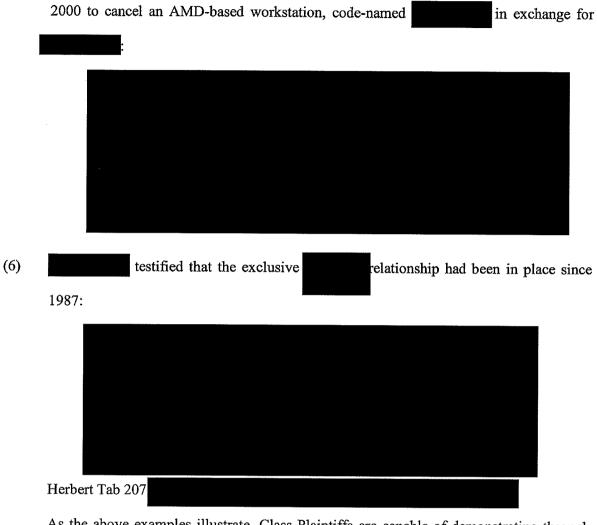
⁶ For illustrative purposes, Class Plaintiffs' provided samples of evidence to demonstrate how they would prove their claims against Intel before a jury, using common, class-wide evidence, while reserving the right to bring additional evidence supporting their claims at a later time. See TP at n.1.

Class Plaintiffs have submitted substantial common evidence detailing multiple instances
of Intel's
See Class Reply at 46-48. See TP Response at 26. The record evidence shows, for
example, See TP at 36.
Id.
TP
Response at 28. Intel again misses the point.
The state of the point of the p
Sac Harbort Tab 47
See Herbert Tab 47
Intel's characterization of the agreement as relating to
is both irrelevant and false. TP Response at 28.
following statement when asked about
Intel also attempts to distinguish an Intel document Class Plaintiffs discuss in the Trial
Plan which shows
TP Response at 27. Intel argues that the
purpose
Id What the



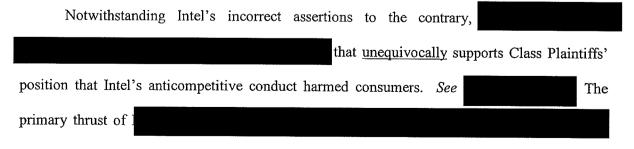


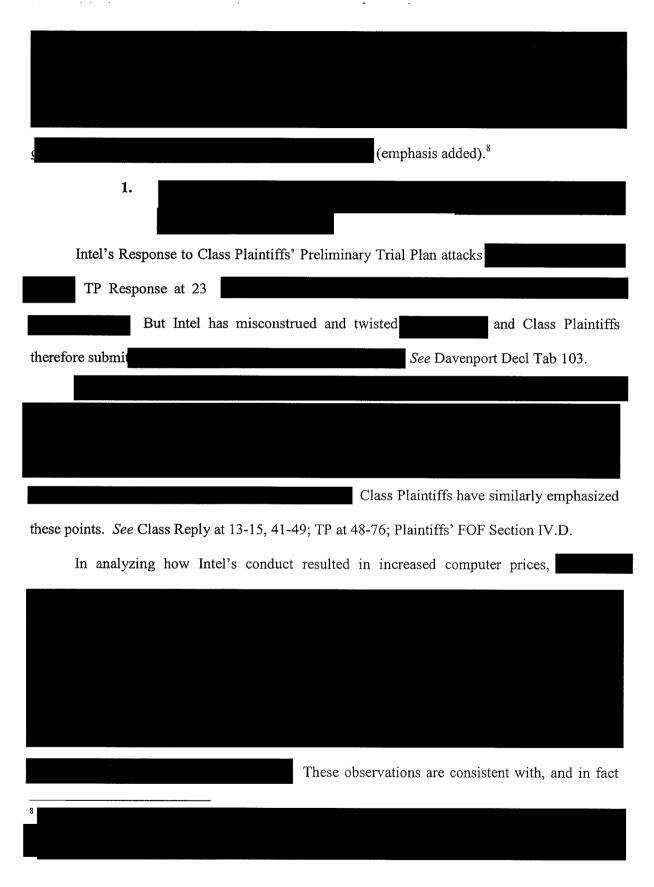
⁷ A more fulsome description of Plaintiffs' Findings of Fact. Plaintiffs' FOF at Section IV.C.3.d.



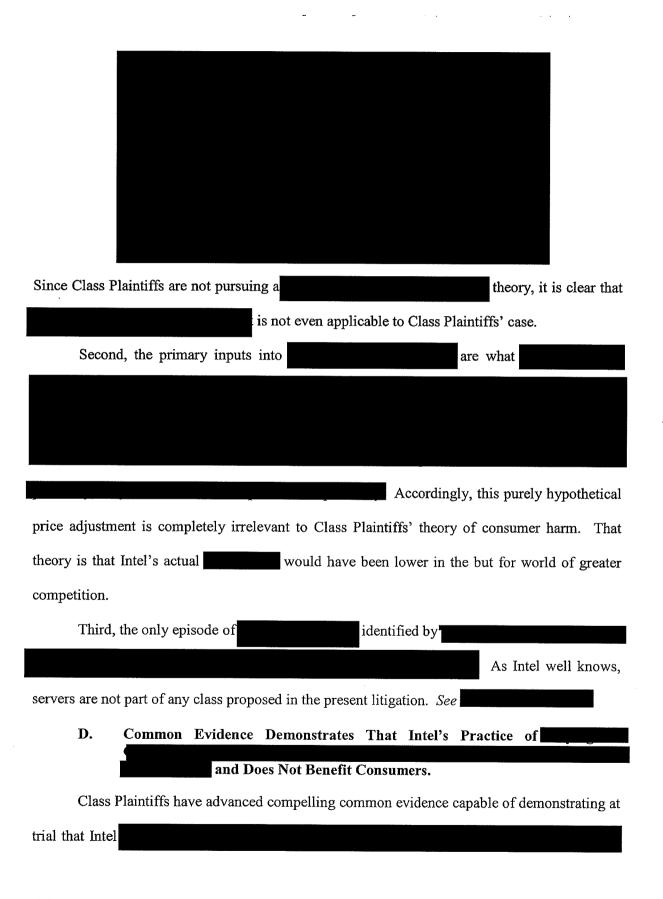
As the above examples illustrate, Class Plaintiffs are capable of demonstrating through common evidence at trial that Intel engaged in anticompetitive conduct substantially before the start of the class period.

C. AMD's Expert Reports Unequivocally Support Class Plaintiffs' Position that Intel's Anticompetitive Conduct Harms Consumers

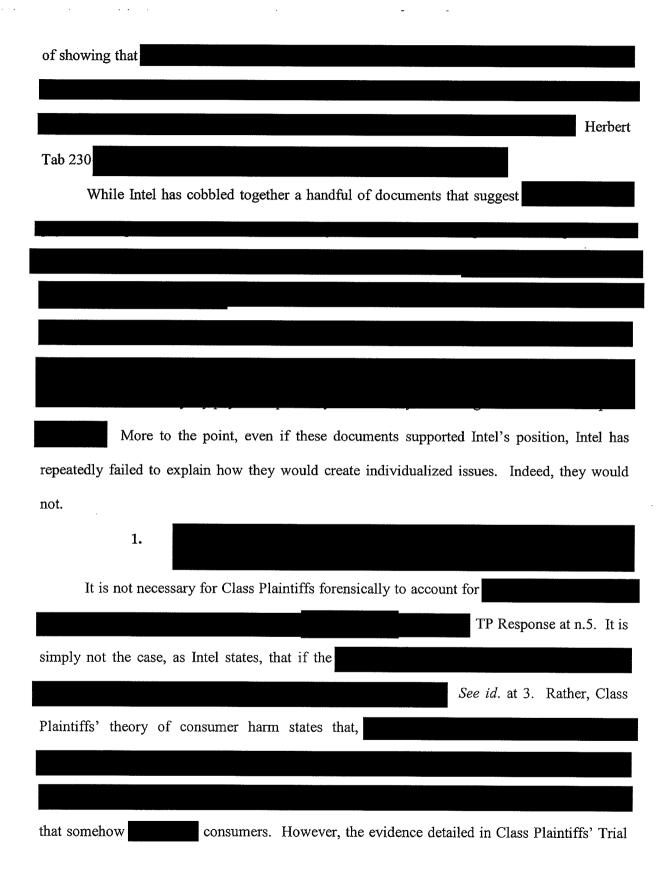




nearly identical, to the positions Class Plaintiffs have taken in support of their motion for class certification. See Class Reply at 1-15, 41-49; TP at 48-76; Plaintiffs' FOF Section IV.D. 2. 3. is Irrelevant to Class Certification Intel makes the tortured argument that, because TR-Response at 23. The argument is simply dead wrong. uses the test to evaluate lays out this distinction as follows:

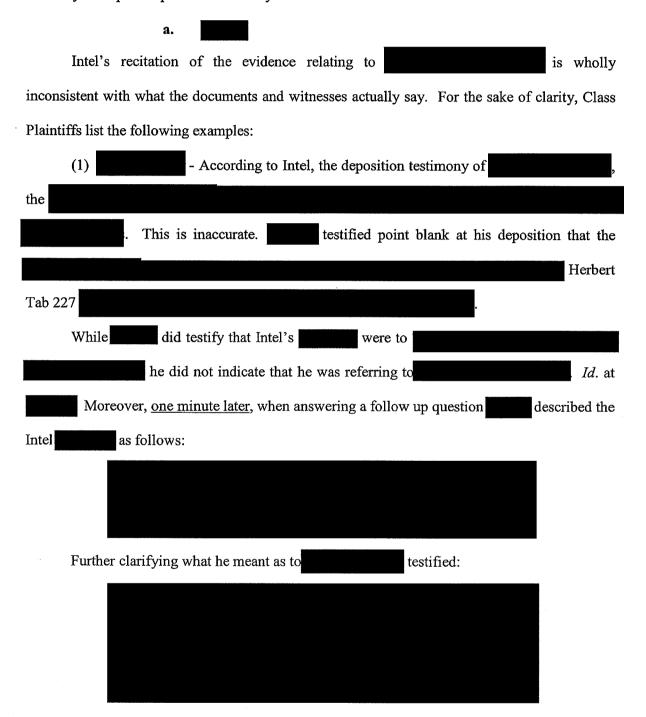


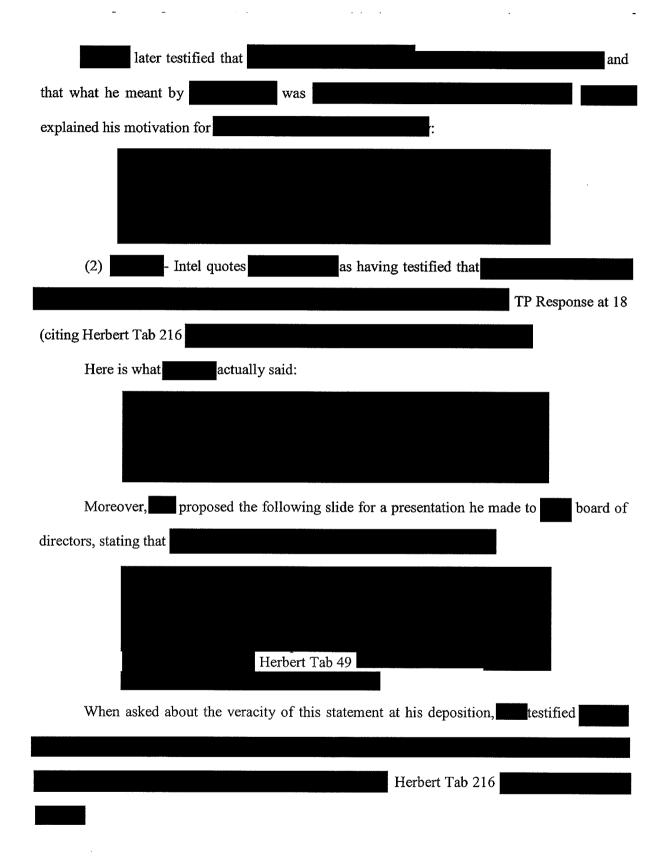
Class Reply at 7-11; TP at 13-21; Plaintiffs' FOF at Section IV.C.2. and ¶74. In this
way, Intel Fully cognizant of this
fact, Intel repeatedly attempts to confuse
While Intel is fully
capable of giving its customers
See Plaintiffs' FOF Section IV.C.;
Class Reply at 7-11, 38-40; Leffler's Revised Reply at 7-16 and n.11, n.17. In any case, the
weight of evidence shows clearly that, regardless of Intel's word games,
Class Plaintiffs' position that
TP Response at 11. This position was stated explicitly in Class Plaintiffs' Opening
Brief and Professor Leffler's Opening Declarations. Class Plaintiffs' Opening Brief in Support
of Motion to Certify Class, D.I. 754 ("Opening Class Brief"), at 1; Opening Declaration of Keith
B. Leffler, D.I. 756, ¶¶ 30-32.
Intel ignores evidence from
(sometimes referred to as would
result in a and and that they feared microprocessor price and and
a resulting would would and
Herbert Tab 11 . In other words,
common evidence is capable of showing that
This evidence is also capable

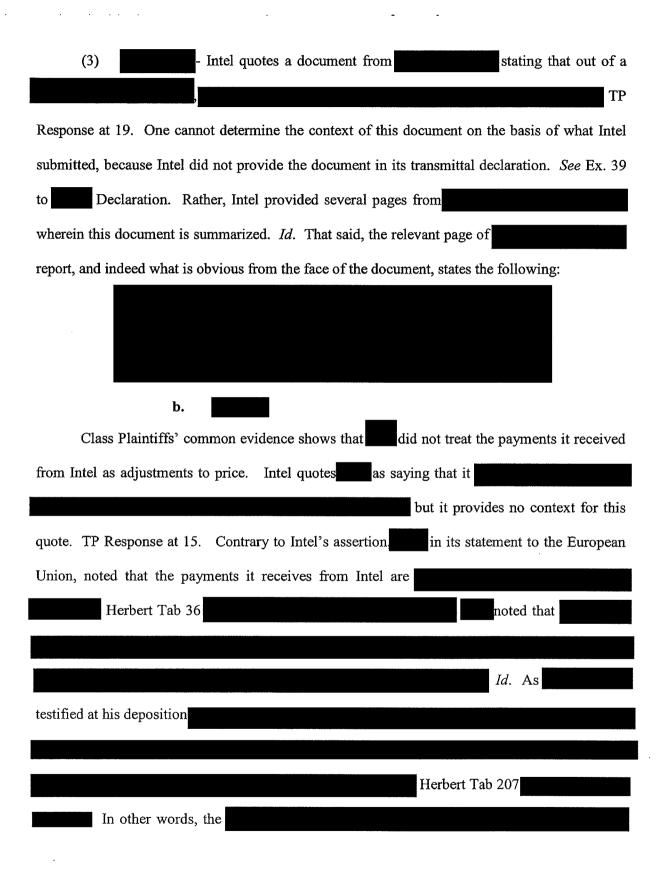


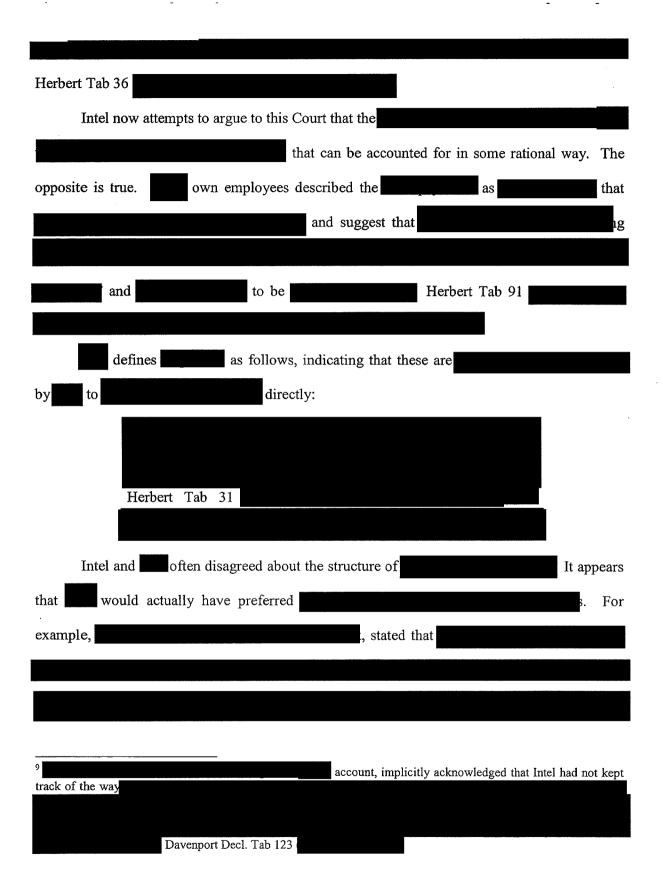
Plan and in Intel's Response to the Trial Plan confirms that, with very limited exceptions, the
Plaintiffs' FOF at Section IV.D.3.b; TP at 22-47; Class Reply at 11-
13.
Leffler's Revised Reply ¶
15 and Exhibit B. Given this fact, Intel's entire discussion about
Id.
. See
26 State Conclusions of Law ¶ 53.
2.
Class Plaintiffs' Trial Plan and Reply Brief contain undisputed common evidence capable
of proving at trial that
. Plaintiffs' FOF at Section IV.D.3.b. That common evidence is also capable
of showing that in certain instances, I
. Id.
TP Response
at 13. In fact, the opposite is true. As the following discussion illustrates, the few documents

that <u>appear</u> to support Intel's position are taken wholly out of context, as are the few passages of carefully excerpted deposition testimony.

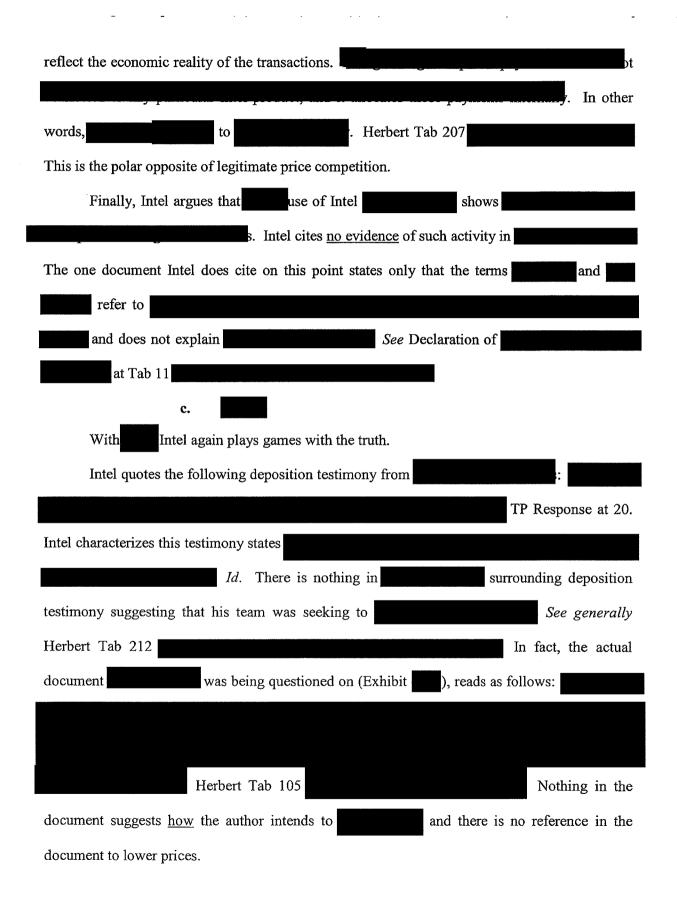


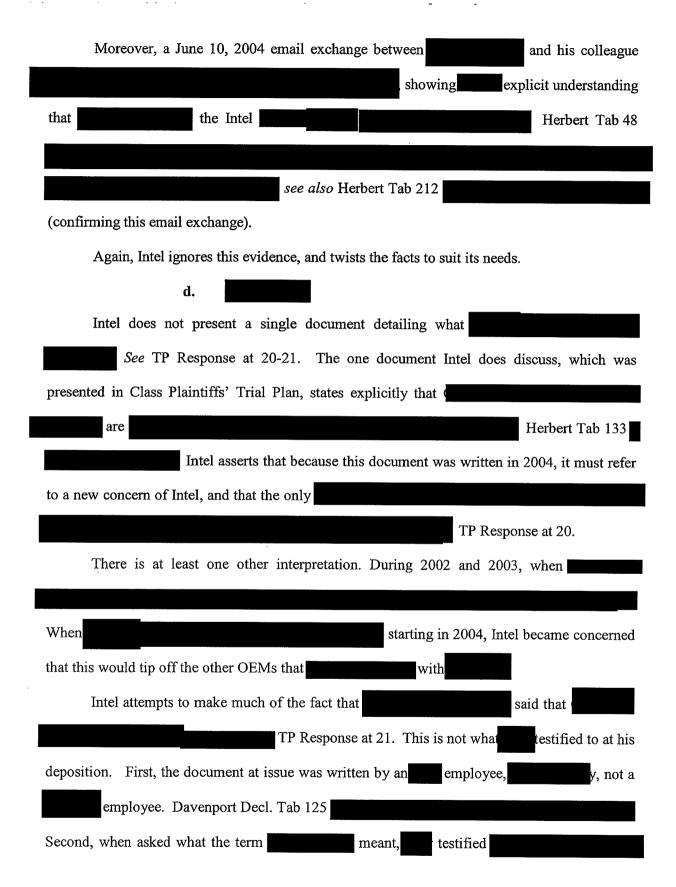


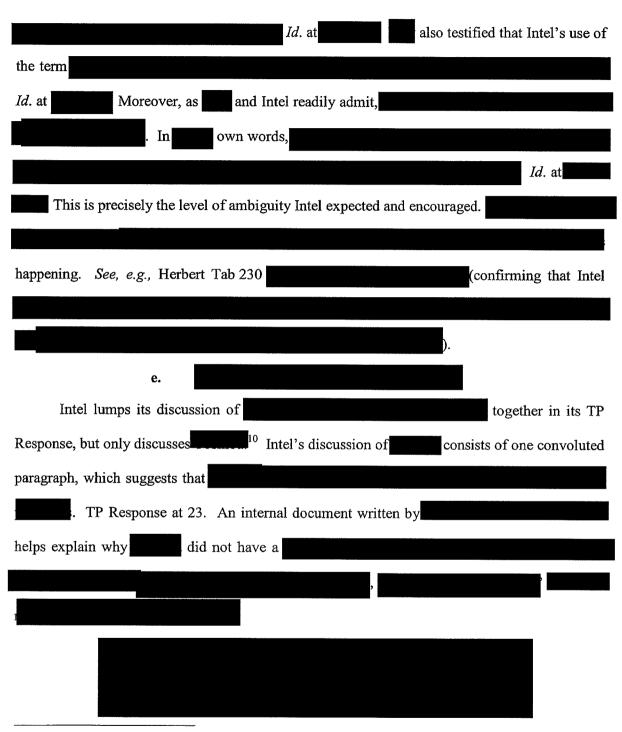




Herbert Tab 89 In other words, and it understood the difference between the two. The following February 1, 2006 e-mail chain is an example of the issue faced when considering whether to Email from and Others: Email from in response to Email from in response to Davenport Decl. Tab 106 On May 27, 2006, in anticipation of the Intel (which noted the following: Davenport Decl. Tab 108 Intel attempts to dismiss these ambiguities by asserting that However, as the discussion above illustrates, these labels are wholly artificial and do not



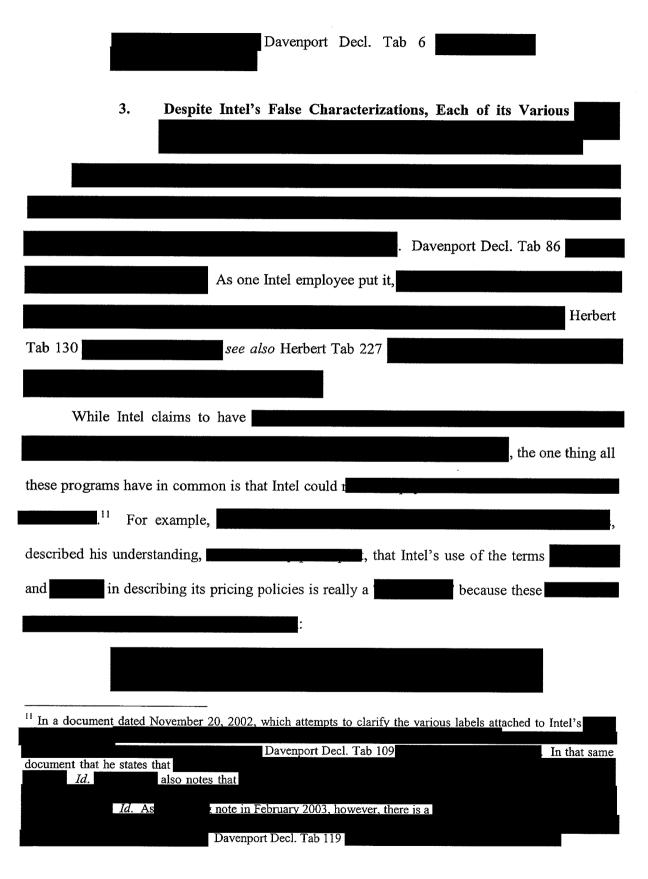


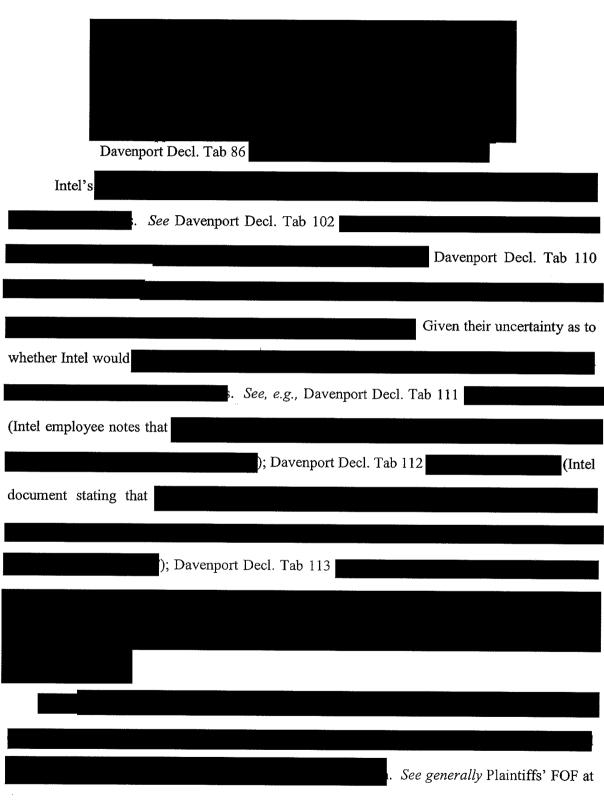


Intel also gratuitously inserts a reference to FTAIA in its discussion of these entities. First, this discussion is misplaced. See 26 State Conclusions of Law for full discussion. Second, the Court's FTAIA ruling dismissed only foreign injuries, and Intel has not established that consumers who purchased products from these manufacturers fall into that category. Third, Class Plaintiffs went to great lengths to provide evidentiary support for their claim that Intel's conduct affected the domestic U.S. subsidiaries of these entities.

See Herbert Tab 203

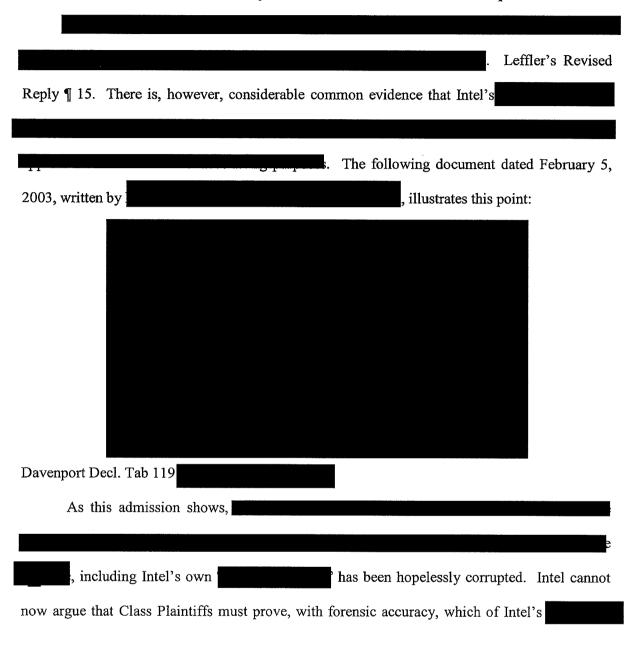
See Herbert Tab 203





Section IV.D.3.2.

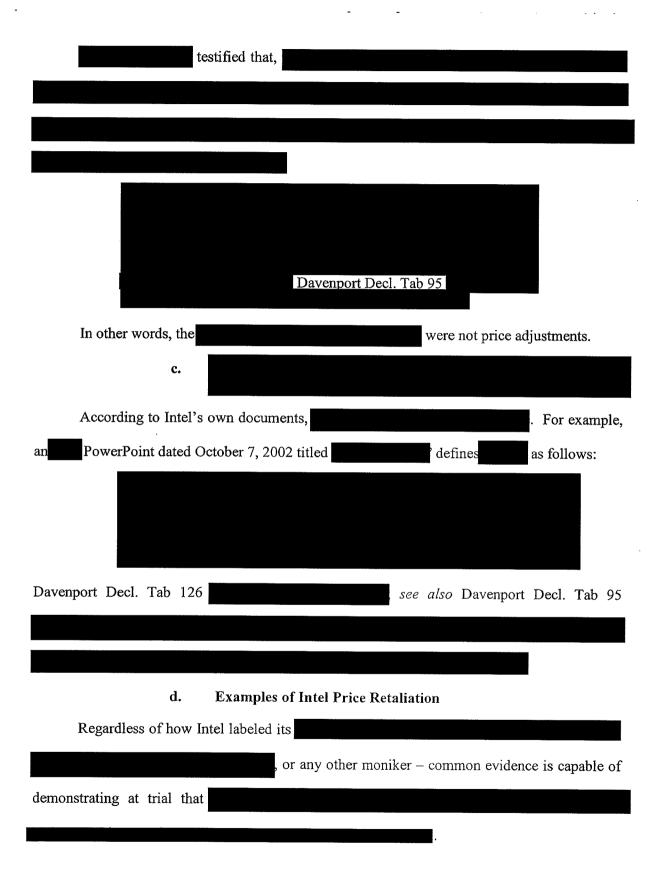
a. Intel's System of Record for Rebates is Corrupt

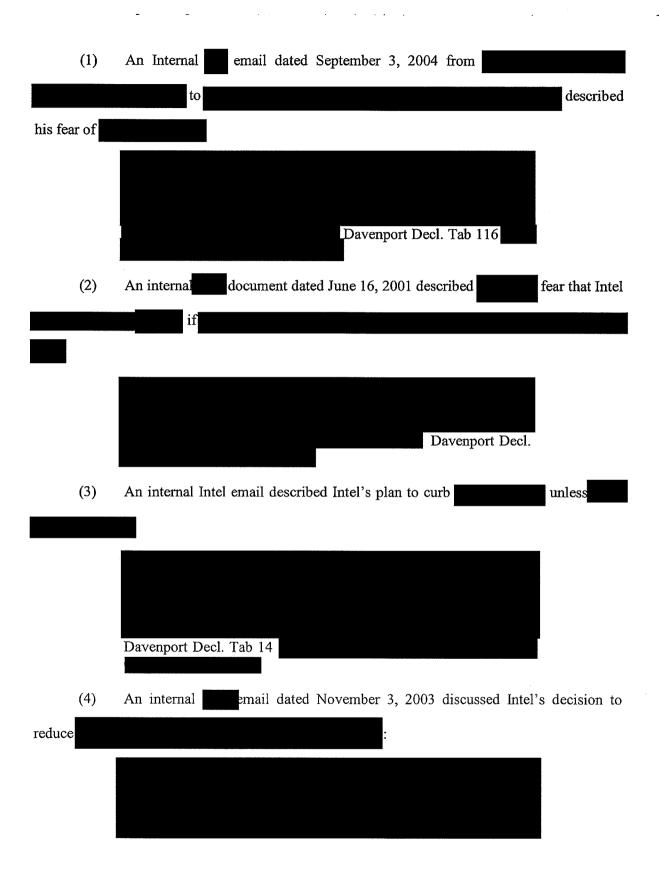


In March of 2003, wrote a self-professed email to and others explaining, that

Davenport Decl. Tab 114 notes that the that there are and that

Id.
b.
Intel incorrectly assumes that, because Class Plaintiffs' Trial Plan has described how
system is supposed to work, 14 that Class Plaintiffs are not
See TP Response at 9; and TP at 59-61
This is not the case. While some
n
was often simply subterfuge for Intel's policy of
Davenport Decl. Tab 86 ; Class Reply at 11-
13 and 38-40.
; one of
Decl. Tab 102 (
13 Intel's own documents demonstrate that Davenport Decl. Tab 116
¹⁴ I.e., See TP at 59-61.



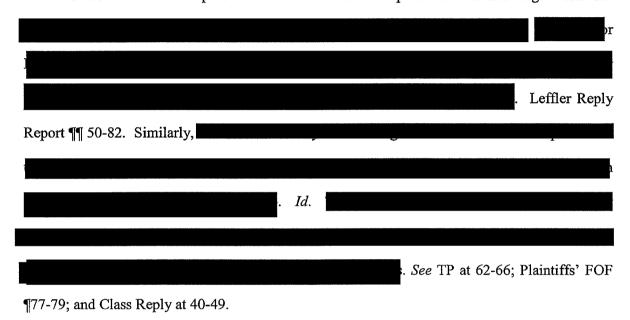


Davenport Decl. Tab 26

There are many other such examples.

E. Common Evidence Demonstrates That Intel's Overcharges Are Passed On to Consumers in the Form of Higher PC Prices

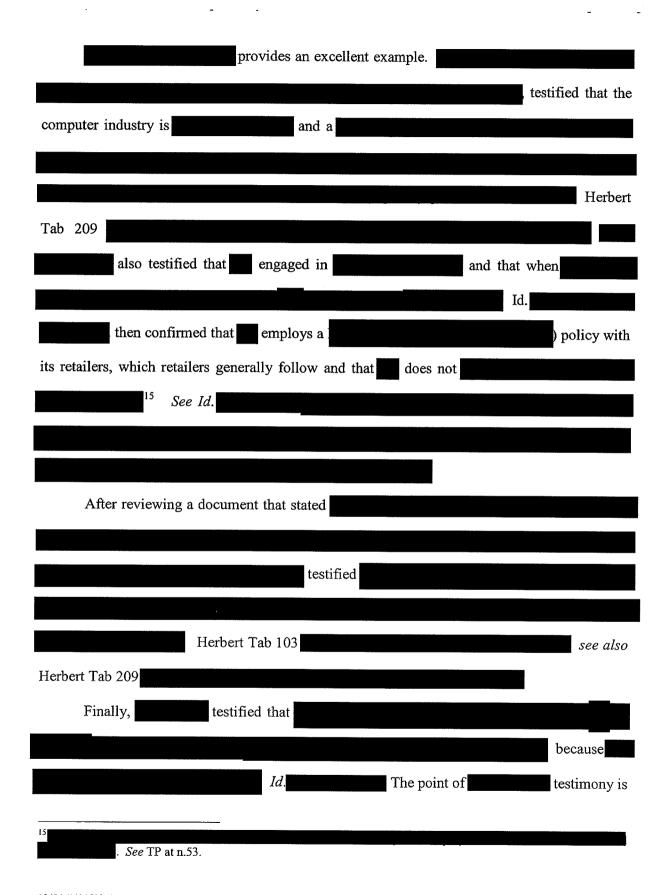
Class Plaintiffs have presented common evidence capable of demonstrating at trial that



Intel has not even attempted to address this evidence. Instead, Intel relies on four declarations submitted by third parties and a handful of snippets from depositions of retailers. Intel's reliance on these sources is misplaced.

First, the third party declarations cited by Intel appear to have been drafted by attorneys and not industry participants. See, e.g., Tab 122

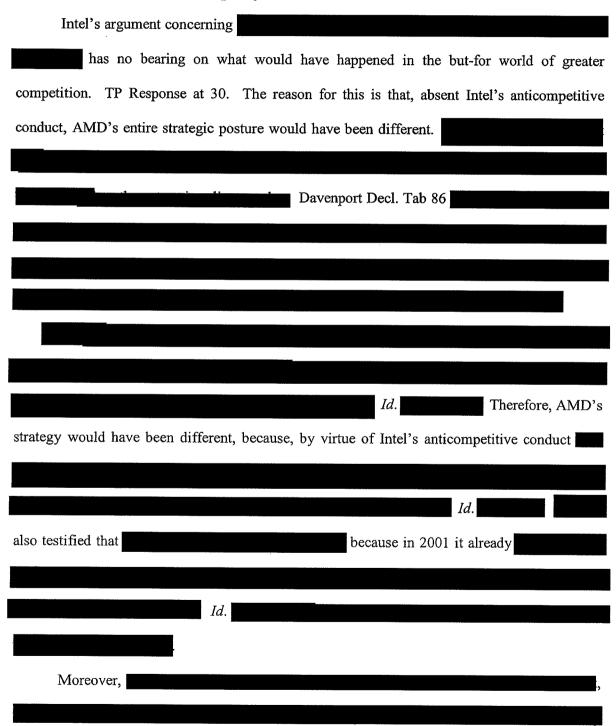
Second, these individuals made statements that undermined Intel's claims at their depositions.



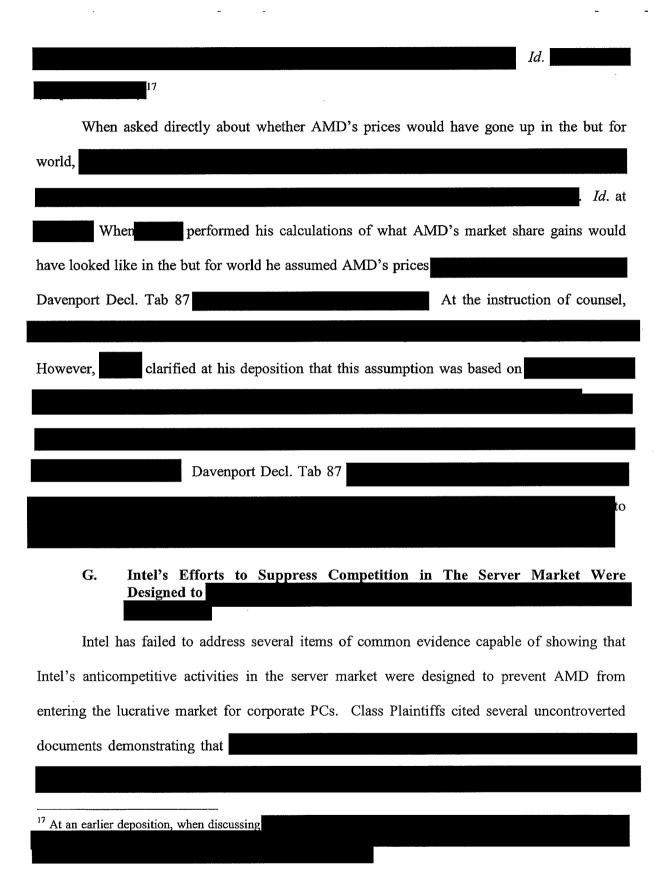
that could The logical extension of this argument is that Intel's Given these statements, it is not surprising that Intel cites only to the nearly identical declaration of these affiants, and, with the exception of does not even mention the fact that they were deposed.¹⁶ Intel's deposition snippets from retailers are no more helpful to its position. See TP Response at 37. While these individuals did make occasional statements that their firms did not engage in Leffler's Revised Reply ¶ 52. At best, what these statements show is that the individuals being deposed did not know whether F. Common Evidence Demonstrates That in The But-For World AMD Would Have Been a More Robust Competitor Across All Products and Market Segments Contrary to Intel's assertion, it is not Class Plaintiffs burden to demonstrate precisely what AMD would have achieved in the but-for world of competition. TP Response at 30. All that matters for class certification in this case is that common proof is Davenport Decl. Tab 122

capable of demonstrating that but-for Intel's conduct, AMD would have been a more robust competitor, and that with increased competition prices come down.

1. AMD's Capacity



testified at his 30(b)(6)
deposition, for example,
Davenport Decl. Tab 87
While assumed for the sake of his calculations
s
testified that absent that instruction it would have been
reasonable for him to assume that in the but for world,
also testified that
t, in
the but for world than it did in the actual world. <i>Id</i> .
2. AMD's Prices
Intel claims that in the but for world
at 33. The documents Intel uses to support this position are
5. Id. (
). In support of its position, Intel cites to a document, which
purportedly states AMD's position that TP Response at 34.
While this is almost certainly an accurate description of Intel's worldview, it is not a view shared
by AMD. When I was shown this document at his deposition
he stated,
Davenport Decl. Tab 86
Upon further questioning on this same document said



Findings of Fact at ¶8.

made the following statement as to this dynamic:

Davenport

Decl. Tab 86

Intel has misinterpreted the argument and wrongly assumes that because it relates to the server market, Class Plaintiffs allege pricing in this case. TP Response at 5. They do not. All of the examples Intel provides on this point relate to . See TP Response at n.10. Moreover, Intel's examples relate exclusively to the server market, which is not part of any proposed class. See id.

The citations to Plaintiffs' Preliminary Joint Statement are particularly misleading, because, as AMD and Class Plaintiffs explicitly stated in

Plaintiffs' Joint Preliminary Case Statement, D.I. 714, at 81.

Intel is well aware that AMD's and Class Plaintiffs' cases are not one in the same, nor are they bound by one another's statements.

H. The Trial Would be Manageable

Intel is misguided in its feeble attempt to cast doubt on the manageability of a trial based on the laws of the 26 states under which Class Plaintiffs assert claims. Proof establishing Class Plaintiffs' claims does not differ depending on state of residence. Moreover, whatever minor

that Statement,

differences may exist between the various state laws relate solely to damages, and can thus be resolved by bifurcating the trial into separate proceedings for liability and damages.

1. Class Plaintiffs' Proposed Bifurcated Trial Structure Ensures That the Trial Will Be Manageable

As stated in the Trial Plan, during Phase I, the Court will consider common issues relating to liability, impact, and total measure of damages to the class. *See* TP 7-9. During Phase II, the Court will address any individualized issues relating to amount of damages. This bifurcated trial structure solves all of the manageability concerns raised in Intel's Response. Thus it is not surprising that Intel's Response conspicuously avoids any substantive discussion of Class Plaintiffs' proposed structure.

Bifurcated trials are routinely used in class actions, and are explicitly permitted by the Federal Rules of Civil Procedure ("F.R.C.P."). See F.R.C.P. Rule 42(b) ("[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, cross claims, counterclaims, or third party claims") F.R.C.P. 42(b); Moores Federal Rules Pamphlet § 42.4[2] at 549 ("[o]ne common application of Rule 42(b) is the conduct of separate trials on the issues of liability and damages, thus bifurcating the trial into a liability phase and a damages phase"); Manual For Complex Litigation (4ht Ed.)(stating "[i]n jury cases, the court may consider trying common issues first, preserving individual issues for later determination); Angelo v Armstrong World Industries, 11 F.3d 957, 964-65 (10th Cir. 1993)(holding that district court did not abuse its discretion by bifurcating trial into damages and liability phases, and that it was not improper to try damages first, then liability). Intel has not offered a single piece of legal authority countering the efficacy of this codified and routinely used trial structure.

As explained fully in the following section, the differences in state laws asserted by Intel are either so trivial that they could not possibly generate predominating individualized issues, or they relate exclusively to damages. This fact is fatal to Intel's argument because damages for individual class members will be calculated during the damages phase of the trial. See Newberg on Class Actions (4th Ed.) § 18:52 (stating "the question [of] whether there has been a violation of the antitrust laws will, in a proper class action, be common to the entire class and amenable to proof by the class representative with individual participation"); § 18:53 ("[i]n many cases, the class representative in an antitrust suit may prove the amount of damages for the entire class, as well as the issue of liability and the fact of damages, thus eliminating the need for individual damage proofs at trial. This will not be burdensome or unmanageable because courts presiding over class actions can, and routinely do, assign special masters to receive evidence during the damages phase, in order to make individual damages determinations based on the calculations. See Newberg On Class Actions (4th Ed.) § 18:54 at 185.

2. Differences in State Antitrust and Consumer Protection Laws Are Irrelevant to Class Certification

Intel's Response to Class Plaintiffs' Trial Plan fails to identify any meaningful distinction among state laws that would necessitate individualized proof during Phase I of the trial Class Plaintiffs have proposed. Any differences in state law are obviously irrelevant to the manageability of a nationwide class certified under California law. Similarly, should 26 separate statewide classes be certified, any manageability issues are irrelevant to class certification because each statewide class must be assessed individually. See Class Plaintiffs' Proposed Conclusions of Law for Certification of a Nationwide Injunctive Class and 26 Statewide Classes, Exhibit A, filed herewith ("26 State Conclusions of Law"), at 22-23. For the sake of clarity, however, Class Plaintiffs will address each of the various state laws Intel's Response attempts to

put at issue. See also Class Reply at 52-58; 26 State Conclusions of Law, Exhibit A (detailing the laws of each statewide class and amenability of each to class certification). See generally 26 State Conclusions of Law.

a. The Differences in State Laws Identified by Intel Pertain Solely to Damage Remedies

TP Response

at 47-48. Intel is incorrect. Common evidence exists to determine the volume of purchases made in each state for such purposes. See Leffler's Revised Reply at ¶ 115-18. Intel raises similar arguments as to Nevada (proof that the class member is elderly or disabled) and Wisconsin (proof that the Wisconsin Department of Agriculture issued an order relating to Intel's conduct). These differences are irrelevant at the class certification stage, however, because they relate exclusively to remedies (i.e., the amount of damages to which an individual class member may be entitled), and will be dealt with during Phase II. Even if the Court had to make a determination about these issues during Phase I, they do not rise to the level of predominant individualized issues.

¹⁸ Class Plaintiffs note here that they are no longer pursuing a single 26-state class of indirect purchasers, and are only seeking to certify (1) 26 separate state classes under the laws of the Included states and (2) a nationwide class under California law. Class Plaintiffs propose a single trial, in bifurcated format, at which evidence common to the class will be used to demonstrate Intel's liability, the corresponding impact on consumers, and the total measure of damages.

^{19/}The Massachusetts consumer protection statute does not have this provision, as Intel contends. Rather, a statutory provision exists to award damages to consumers, while another exists to award damages to businesses. See Mass. Gen. Laws ch. 93A §§ 9, 11.

b. A Limited State-by-State Analysis Shows That There Are No Substantive Differences Between the State Laws at Issue in This Case

As Class Plaintiffs have stated repeatedly, and as the state-by-state analysis below demonstrates, the common evidence that will be presented at trial is capable of demonstrating

Class Plaintiffs have limited the state-by-state analysis below to focus only on the eleven states put at issue by Intel. *See* TP Response at 40-51. Intel has not and cannot identify any meaningful distinction between these two formulations of the same general principle that American antitrust law does not permit monopolists to purchase market share from their customers, to retaliate against those customers when they attempt to do business with the monopolists' rivals, or take any other actions that foreclose markets to competition and injure consumers. *See also* Class Reply at 51-58.

(1) <u>Arkansas Deceptive Trade Practices Act ("DTPA")</u>.

Intel makes two arguments as to the Arkansas Deceptive Trade Practices Act ("DTPA"). First, Intel argues that this statute does not prohibit antitrust violations. TP Response at 42. Second, Intel asserts that Arkansas's prohibition on the exercise of

somehow elevates the proof required to demonstrate a violation of the DTPA beyond what would be required under the Sherman Act or the laws of the other Included States. TP Response at 46. Both arguments are incorrect.

First, the elements of the applicable provisions of the Arkansas consumer protection statutes are the same as the elements of the applicable provisions of the consumer protection statutes of several other states. *See* Annex C to Plaintiffs' Motion for Class Certification, D.I. 757. Moreover, Arkansas's DPTA prohibits "unfair trade practices," and courts have certified

indirect purchaser class action cases under Arkansas law. *See* 26 State Conclusions of Law at 1; Annex F to Motion for Class Certification, D.I. 757.

Second, even if Intel correctly interprets Arkansas law, which it does not, common evidence is capable of demonstrating at trial that Intel's conduct was unconscionable in that it the Arkansas consumer protection laws were designed to prevent. See 26 State Conclusions of Law, Exhibit A. This evidence will demonstrate that

See Class Reply at

6-15, 49-51; Plaintiffs' FOF at Section IV.C-E; TP at 13-21, 75-76.

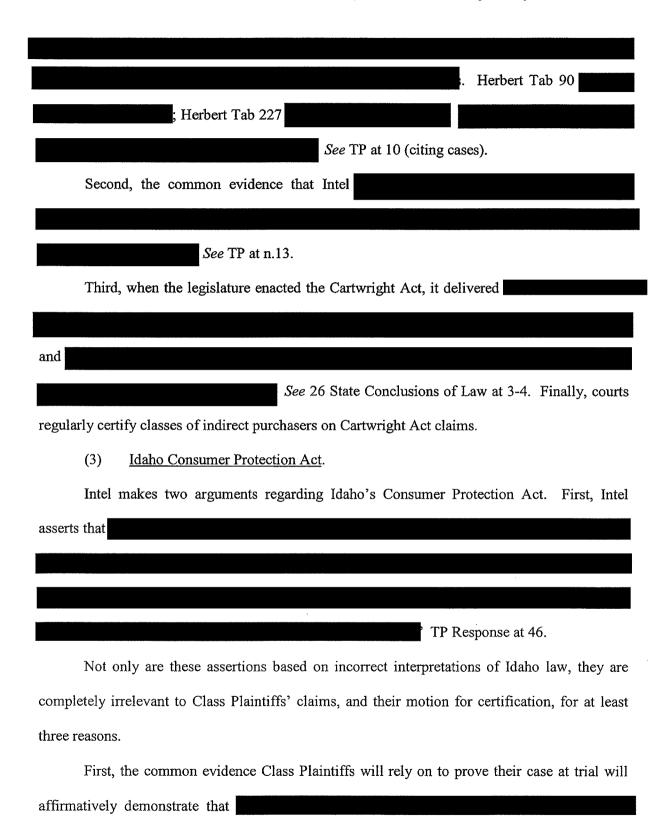
(2) <u>California's Cartwright Act.</u>

Response at 42. This argument is makeweight. There is no exclusive language in either act. Moreover, the elements of the Sherman and Cartwright Acts are nearly identical, except that the Cartwright Act requires the additional showing that Intel acted in "combination" with other entities when restraining trade in the relevant market for x86 microprocessors. *See* 26 State Conclusions of Law at 3-4.

Intel argues that California's Cartwright Act, Cal. Bus. & Prof. Code § 16720, et seq., is

The Cartwright Act's "combination" requirement will be satisfied easily by the common evidence Class Plaintiffs will present at trial, no matter what claim is at issue.

First, as Class Plaintiffs explained in their Trial Plan, the mere existence of satisfies this element. Common evidence is capable of showing at trial that Intel



See TP

at n.21. Class Plaintiffs will present this common evidence no matter what law is at issue, and no matter what class is ultimately certified.

Second, Class Plaintiffs have put forward considerable common evidence capable of demonstrating that

See 26 State Conclusions of Law at 8-9.

Third, Idaho's consumer protection law, like the laws of several other states, gives "due consideration and great weight . . . to the interpretation of the federal trade commission and the federal courts relating to section 59(a)(1) of the federal trade commission act (15 U.S.C. § 45(a)(1))." As explained above, common evidence is capable of demonstrating that

(4) Kansas Antitrust Statute.

Intel makes two arguments about Kansas's antitrust statute. First, Intel asserts that Class Plaintiffs must introduce individual evidence to prove whether the proposed class members purchased computers for home use. TP Response at 47. As discussed above, this distinction is irrelevant to class certification.

Second, Intel argues that Kansas's prohibition on the exercise of somehow elevates the proof required to demonstrate a violation of this act beyond what would be required under the Sherman Act or the laws of the other Included States.

TP Response at 46. This argument makes no sense.

Under Kansas law, anticompetitive agreements, such as those alleged by Class Plaintiffs in this case, are explicitly prohibited. 26 State Conclusions of Law at 10-11; see also Four B Corp. v. Daicel Chemical Industries, Ltd., 253 F. Supp. 2d 1147, 1150, 1152 (D. Kan. 2003) (indirect purchasers have standing under this statute to sue for antitrust misconduct).

Moreover, even if Intel's interpretation of Kansas law were correct, which it is not, common evidence is capable of demonstrating that

. See Class Reply at 6-15, 49-51;

Plaintiffs' FOF at Section IV.C-E; TP at 13-21, 75-76. Such acts are an obvious illegal exercise of "grossly unequal bargaining power" under Kansas law. 26 State Conclusions of Law at 10-11; Annex F to Motion for Class Certification.

(5) Maine Antitrust and Unfair Trade Practices Acts.

As to Maine's statutes, Intel asserts only that individual evidence must be introduced to prove whether the proposed class members purchased computers for home use. TP Response at 47. As discussed above, this distinction is irrelevant to class certification as it relates solely to individual damage remedies. Moreover, several courts have certified Maine classes of indirect purchasers under the Maine antitrust and consumer protections statutes. *See* Annex F to Motion for Class Certification.

(6) Massachusetts Consumer Protection Act.

Regarding the Massachusetts Consumer Protection Act, Intel asserts only that individual evidence must be introduced to prove whether the proposed class members purchased computers for home use. TP Response at 47. First, as discussed above, this distinction is irrelevant to class

certification as it relates solely to individual damage remedies. Second, Massachusetts's consumer protection statute prohibits "unfair methods of competition," which includes conduct by Intel that is at issue in this case. *See* 26 State Conclusions of Law at 13.

Third, to the extent common evidence is capable of demonstrating that Intel's conduct violated FTCA § 5, such evidence is equally capable of demonstrating, without material distinction, that Intel's conduct also violated Maine's consumer protection act because the two acts have been interpreted as analogous. *Id*.

(7) Nevada Unfair Trade Practices Act and Consumer Protection Statute.

Intel argues that only elderly or disabled plaintiffs can assert claims under Nevada's Deceptive Trade Practices Act, and makes no mention of Nevada's Consumer Protection Statute. TP Response at 48. Defendant's assertions are incorrect and Intel fails to cite any Nevada law from any Nevada authority to support its arguments. Intel fails even to identify what provision in the Nevada statute its argument relies on. Instead, Intel cites to a case from the Eastern District of Pennsylvania in support of this tenuous proposition.

To the contrary, the language of Nevada's UTPA explicitly allows private antitrust plaintiffs to sue for damages and injunctive relief. See 26 State Conclusions of Law at 17-18. Nevada's UTPA specifically prohibits monopolization, and provides that indirect purchasers may sue for such violations. Id. Finally, the Nevada UTPA "shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes." Id.

(8) New Mexico Antitrust and Unfair Practices Acts.

Intel asserts that New Mexico's definition of the term "unconscionable" and its prohibition on the exercise of "grossly unequal bargaining power" somehow elevate the proof

required to demonstrate a violation of this act beyond what would be required under the Sherman Act or the laws of the other Included States. This is wrong for several reasons.

First, Intel's interpretation of New Mexico law is hopelessly convoluted. Under the New Mexico Antitrust Act, it is "unlawful for any person to monopolize or attempt to monopolize, or combine or conspire with any person or persons to monopolize, trade or commerce, any part of which trade or commerce is within the state." N.M. Stat. Ann. § 57-1-2. The statute expressly provides that indirect purchasers who are "threatened with injury or injured" have standing to assert such a claim, and "may bring an action for appropriate injunctive relief, up to threefold the damages sustained and costs and reasonable attorneys' fees." *See* 26 State Conclusions of Law at 19-20. Claims under the New Mexico Antitrust Act have been certified for class treatment in cases brought by indirect purchasers in both state and federal courts.

Second, *In re Graphics Processing Units Antitrust Litig.*, 527 F.Supp. 1011 (N.D. Cal. 2007) ("GPU II"), the only case cited by Intel on this point, did not even deal with monopolistic conduct.

Third, even if Intel's interpretation of New Mexico law were correct, which it is not,
common evidence is capable of demonstrating that
See Class Reply at 6-15, 49-51;
Plaintiffs' FOF at Section IV.C-E; TP at 13-21, 75-76. Such acts are
under New Mexico law. See 26 State Conclusions of Law
at 19-20

(9) New York General Business Law (GBL) § 349(h).

Intel asserts that New York consumer protection law applies only to false advertising claims. TP Response at 46. This is incorrect.

The elements of a New York General Business Law § 349 claim are much broader than Intel asserts: (1) a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way, and (2) that plaintiff has been injured as a result. See 26 State Conclusions of Law at 20-21. Moreover, courts have certified classes in cases alleging "monopolistic business practices." Id. at 21.

(10) Rhode Island Deceptive Trade Practices Act ("DPTA").

Intel claims that none of the enumerated practices outlined in Rhode Island's unfair trade practices and consumer protection acts prohibit antitrust violations. Like its other tortured interpretations of state law, this too is incorrect.

Rhode Island's DPTA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices." See 26 State Conclusions of Law at 23-24. The common proof that Class Plaintiffs will present at trial is capable of demonstrating that Intel engaged in unfair methods of competition under Rhode Island law.

(11) West Virginia Antitrust Act.

As to the West Virginia Antitrust Act, Intel asserts only that individual evidence must be introduced to prove whether the proposed class members purchased computers for home use. TP Response at 47. As discussed above, this distinction is irrelevant to class certification as it relates solely to individual damage remedies.

For the sake of clarity, Class Plaintiffs note here that the West Virginia Antitrust Act declares unlawful "[t]he establishment, maintenance or use of a monopoly or an attempt to

State and federal courts have certified West Virginia indirect purchaser under West Virginia's Antitrust Act.

(12) District of Columbia Consumer Protection Procedures and Antitrust Acts.

Intel asserts that the District of Columbia's consumer protection law prohibits "grossly unequal bargaining power," and that this prohibition somehow elevates the proof required to demonstrate a violation of this act beyond what would be required under the Sherman Act or the laws of the other Included States. This is wrong for several reasons.

First, the DCAA makes it "unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce" (D.C. Code § 28-4503), and expressly provides a cause of action for indirect purchasers. *See* 26 State Conclusions of Law at 5-6.

Second, common evidence is capable of demonstrating at trial that Intel's conduct was unconscionable in that it exercised precisely the "kind of the grossly unequal bargaining power" the CPPA was designed to prevent. This evidence demonstrates that Intel coerced its customers into anticompetitive money-for-market-share agreements that they would not otherwise have entered into. *See* Plaintiffs' FOF at IV.C.

(13) Wisconsin Antitrust Act.

Without analyzing any part of the actual statute, Intel asserts that there is no private right of action under this law unless there has been an order issued by the Wisconsin Department of Agriculture. A plaintiff may bring suit under the Wisconsin antitrust act when, as here, "the

conduct complained of 'substantially affects' the people of Wisconsin and has impacts in this state, even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside of the state." See 26 State Conclusions of Law at 28-29. Claims under the Wisconsin antitrust and consumer protection statutes have been certified for class treatment in numerous cases in state and federal courts. See Annex F to Motion for Class Certification.

As noted above, even if Intel's interpretation of Wisconsin law were correct, which it is not, this distinction would only apply to the remedy available to a given class member (*i.e.*, the amount of his or her damages), and would not preclude a trial on common issues. This argument is therefore irrelevant to class certification.

c. Intel's Conduct Violated § 5 of the FTCA Which is a Predicate Act That Automatically Violates the Consumer Protection Laws of Several Included States

Common evidence is capable of demonstrating at trial that Intel's conduct violated § 5 of the FTCA. FTCA § 5, like the Sherman Act § 2, prohibits dominant firms from entering and maintaining exclusive dealing arrangements with their customers and thereby foreclosing key distribution outlets in order to injure rivals, or taking other similar actions that foreclose their rivals from participating in the relevant market.²⁰ This is particularly significant in light of the

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²⁰ See MGA Entertainment, Inc. v. Mattel, Inc., 2005 WL 5894689 (C.D.Cal. August 26, 2005), which chronicles the following FTC cases on this issue: Federal Trade Commission ("FTC") v. Brown Shoe Co., 384 U.S. 316, 321 (1966) ("basic policies" of antitrust laws violated when second largest shoe manufacturer employed extremely attractive program that required retailers "substantially to limit their trade with [manufacturer's] competitors"); Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974) (affirming FTC finding that powerful supplier violated FTCA by coercing distributors and retailers into participating in a variety of anticompetitive conduct, including excluding products of supplier's competitor); Union Circulation Co. v. FTC, 241 F.2d 652, 655-56 (2d Cir. 1957) (affirming FTC finding that defendants violated FTCA by "coercing" others into not doing business with defendants' competitor); Hastings Mfg. Co. v. FTC, 153 F.2d 253 (6th Cir. 1946) (affirming FTC finding that defendant violated FTCA by using various means to induce distributors into refusing to handle competitors' products); Carter Carburetor Corp. v. FTC, 112 F.2d 722, 734-36 (8th Cir. 1940) (affirming FTC finding that powerful supplier violated FTCA by "inducing, coercing and compelling many independent [retailers] to cancel existing sales contracts with ... competitor and to cease and refuse to deal in the products of such competitor"); FTC v. Wallace, 75 F.2d 733 (8th Cir. 1935) (affirming FTC finding that defendant coal dealers violated FTCA by intimidating and threatening to boycott suppliers that dealt with competitors); Amarel v. Connell, 202 Cal.App.3d 137, 142, 145 (1988) (plaintiff rice growers stated antitrust claim against powerful vertically-integrated competitors, in part,

fact that the FTC has initiated an administrative proceeding against Intel alleging that Intel has violated FTCA § 5.²¹

i. A Violation of FTCA § 5 is a Predicate Act That Constitutes a Violation of California's UCL.

To state a claim under California Business and Professions Code § 17200, California's Unfair Competition Law or "UCL," Class Plaintiffs need only establish that Intel engaged in business practices that were "unlawful, or unfair, or fraudulent." *Cel-Tech Communications, Inc.* v. Los Angeles Cellular Telephone, 20 Cal. 4th 163, 180 (1999) ("Cel-Tech"). "Because it is written in the disjunctive," each of these prongs represents an independent basis for a cause of action under the UCL. Id. "In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." Id. The evidence in this case establishes that Intel's conduct was both unlawful and unfair.

The "unlawful" prong of the UCL "governs 'anti-competitive' business practices as well as injuries to consumers, and has as a major purpose "the preservation of fair business competition." *Id.* This prong "proscribes any unlawful business practice, [and] borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Id.* The California Supreme Court has squarely stated that

because competitors refused to do business with those who dealt with plaintiffs' customers); Kolling v. Dow Jones & Co., Inc., 137 Cal.App.3d 709 (1982) (violation of antitrust laws for supplier to threaten, intimidate, and coerce distributor into participating in anticompetitive conduct); R.E. Spriggs Co., Inc. v. Adolph Coors Co., 94 Cal.App.3d 419, 425 (1979) (violation of antitrust laws for supplier to force distributors into anticompetitive behavior "through suggestions which the distributors could not refuse"). Compare Compl. ¶ 78 (alleging Mattel bought up supply of doll hair from two largest suppliers to lock MGA out of market), with Amarel, 202 Cal.App.3d at 142, 145 (plaintiff rice growers stated antitrust claim against integrated competitors, in part, because competitors locked plaintiffs' customers out of ports necessary for business).

²¹ The FTC alleges that "[t]his antitrust case challenges Intel's unfair methods of competition and unfair acts or practices beginning in 1999 and continuing through today, and seeks to restore lost competition, remedy harm to consumers, and ensure freedom of choice for consumers in this critical segment of the nation's economy. Intel's conduct during this period was and is designed to maintain Intel's monopoly in the markets for Central Processing Units ("CPUs")" Davenport Tab 101, In the Matter of Intel Corporation, Dkt. No. 9341, Complaint, ¶2 (Dec. 16, 2009 F.T.C) ("FTC Compl.").

"[t]he Legislature intended this 'sweeping language' to include 'anything that can properly be called a business practice and that at the same time is forbidden by law." Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 560 (1998). Given this standard, "[v]irtually any law – federal, state or local – can serve as a predicate for a section 17200 action." Stevens v. Superior Court, 75 Cal.App.4th 594 (1999).

It is therefore straight-forward that the evidence in this case establishes that Intel violated the UCL through its predicate violations of California's Cartwright Act, the consumer protection and antitrust statutes of the Included States, and Section 2 of the Sherman Act. See, e.g., Manufacturers Life Insurance Co. v. Superior Court, 10 Cal.4th 257, 266 (1995) (holding that a defendant's violation of the Cartwright Act gives rise to a private right of action under the UCL); Rambus v. Infineon Technologies AG, 304 F.Supp.2d 812, 820 (E.D.Va. 2004) (applying California law and finding that plaintiffs could properly plead a UCL claim based on defendant's alleged violation of Section 2 of the Sherman Act); see also Cel Tech, 20 Cal.4th at 179 (stating that one of the purposes of the UCL is to "safe-guard the public against the creation or perpetuation of monopolies and to foster and encourage competition").

ii. A Violation of the FTCA § 5 Constitutes a Violation of the Consumer Protection Statutes of the Included States.

Violations of Federal Law, including violations of the FTCA's prohibition of anticompetitive conduct, which can clearly be demonstrated by common evidence in this case, constitute violations of the consumer protection statutes of the Included States; the so-called "little FTC Acts." Under these little FTC Acts, "unfair competition" is defined as, *inter alia*, "

²² The "Consumer Protection" statutes of the following states parallel FTCA § 5 and are referred to as the "little FTC Acts": Arizona, California's UCL, Florida, Idaho, Maine, Massachusetts, Nebraska, Nevada, North Carolina, New Hampshire, New Mexico, South Dakota, Vermont, West Virginia, and Wisconsin. These "little FTC Acts," generally "parallel the proscription of 'unfair methods of competition' and/or 'unfair or deceptive acts or practices'

any method of competition that violates Federal Law." See Annex C: Part 1, submitted in conjunction with Plaintiffs' Class Brief.

Not only is common proof capable of independently demonstrating that Intel's conduct violated FTCA § 5, but proof of Intel's Sherman Act violations is sufficient as a matter of law to trigger liability under FTCA § 5 and "little FTC Acts" of the Included states. The reason for this is that "[i]t is clear that any activity that violates the Sherman Act also violates § 5(a)(1) of the FTCA, [which] is much broader, [and which is] also designed to 'stop in their incipiency acts and practices which, when full blown, would violate those acts." *Lippa's, Inc. v. Lennox, Inc.*, 305 F.Supp. 182, 186-87 (D. Vt. 1969).

Therefore, to the extent Class Plaintiffs prove that Intel violated the Sherman Act § 2 or FTCA § 5, they have also necessarily shown that Intel violated the Unfair Competition laws of the Included States Consumer Protection Statues.²³

contained in Section 5 of the Federal Trade Commission Act (FTC Act)." STATE ANTITRUST PRACTICE AND STATUTES (THIRD ED. 2004), V.1 at 1 (generally), 4-36 (Arizona), 6-3 (California), 11-3 (Florida), 15-1 (Idaho), 22-2 (Maine), 24-1 and 2 (Massachusetts), 26-1 (Minnesota), 28-1 (Missouri), 30-1 (Nebraska), 31-1 (Nevada's Unfair Trade Practices Act is "construed in harmony with prevailing judicial interpretations of the federal antitrust statutes"), 32-1 (New Hampshire), 34-1 note 9 (interpretations of New Mexico's Unfair Practices Act "should be guided by the rulings of the Fair Trade Commission and the federal courts"), 36-2 (North Carolina), 45-1 (South Dakota), 49-1 (Vermont), 53-2 (West Virginia), 54-1 note 7 (Wisconsin); see also, e.g., FLA STAT § 501.204(2) (stating that Florida's consumer protection statute is to be construed consistently with § 5 of the FTCA); The In Porters, S.A. v. Hanes Printables, Inc., 663 F.Supp. 494, 502 n.7 (M.D.N.C. 1987) (stating "[a] violation of FTCA § 5 amounts to a violation of the Sherman Act; consequently, a violation of the Sherman Act violates North Carolina's unfair trade practices act")(emphasis added); Opening Class Brief at Annex C, D.I. 757.

If Class Plaintiffs demonstrate that Intel violated § 2 of the Sherman Act, they have also demonstrated that Intel violated the monopolization laws of the Included States. Intel has consistently failed to address the fact that the monopolization statutes of the following states and the District of Columbia have been construed as analogous or otherwise "harmonized" with Section 2 of the Sherman Act by their various courts and state legislatures: Arkansas, Arizona, California, Kansas, Iowa, Maine, Michigan, Minnesota, Mississippi, Nevada, Nebraska, New Mexico, New York, North Carolina, North Dakota, Rhode Island, South Dakota, Tennessee, West Virginia, and Wisconsin. See Class Plaintiffs' Opening Class Brief at Annex B, D.I. 757; and STATE ANTITRUST PRACTICE AND STATUTES (THIRD ED. 2004), at 5-1 (Arkansas), 18-11 (Iowa), 19-2 (Kansas), 37-1, 25-1 (Michigan), (North Dakota), 43-1, 35-1 (New York analogous to Sherman Section 2, but like California's Cartwright Act requires additional showing of concerted action, which is present here), (Rhode Island), 46-2 (Tennessee).

d. Despite Any Purported Issues Related to Manageability, CAFA Mandates This Court to Follow The Substantive Laws of The Various States

Even if the Court were to find merit in Intel's concerns of case manageability, these concerns are not a reason to deny certification. Courts have concluded that denying certification on the grounds Intel relies on runs afoul of the Class Action Fairness Act ("CAFA"). See Class Reply at 54. By enacting CAFA, "Congress thus envisioned that such claims – involving thousands of plaintiffs from many states – would be litigated in one forum." Id. The express purpose of CAFA was to provide a Federal forum for adjudicating the merits of most class actions, and was not intended to provide defendants with a procedural means for avoiding involvement with cases that might be difficult or inconvenient. See id.

Moreover, regardless of manageability concerns, courts presiding over class actions are bound to follow the underlying substantive antitrust and consumer protection laws of each relevant state. See 26 State Conclusions of Law at 2. Given this core principle, the Court should not deny class certification for any statewide class merely because there are 25 other statewide classes seeking to be certified. Id. Rather, the certification decision should be made separately and independently for each statewide class as if that were the only class presented to the Court for certification. Class Plaintiffs therefore are not prejudiced by the fact that CAFA and the multi-district litigation statute together enable adjudication of all 26 state-law class actions in one federal court instead of separate adjudication of each class action in 26 different courts. Id.²⁴

²⁴ Intel asserts that under Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerack, 523 U.S. 26 (1998),

TP Response at 40. This argument is nonsense. Lexecon has nothing to do with class certification and does not say that classes should not be certified because cases may eventually be tried in non-MDL proceedings. Moreover, most of the complaints in this case were filed in the U.S. District Court for the District of Delaware, and Class Plaintiffs have since filed a consolidated amended complaint that supersedes the original complaints. D.I. 49.

CONCLUSION

As Class Plaintiffs' Preliminary Trial Plan makes clear, and as further explained herein, a manageable trial based on classwide, common evidence is feasible, irrespective of whether the Court certifies a nationwide class or several statewide classes. Intel has presented no evidence to the contrary. Class Plaintiffs' bifurcated trial plan should therefore be accepted as sufficient for class certification.

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